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No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a local governmental agency limit the distance of non-stop airline flights, in view of section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1), which prohibits states and interstate agencies from regulating the "rates, routes, or services of any air carrier"?

2. Do the "proprietary powers" of airport operators preserved by section 105(b)(1) of the Airline Deregulation Act, 49 U.S.C. app. § 1305(b)(1), include the power to impose an extraterritorial restriction upon the distance of non-stop flights?

3. Does a local governmental agency operating airports have any jurisdiction over the use made by airlines of airport "landing slots" granted by the FAA under 14 C.F.R. §§ 93.121-93.133?

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MISCELLANEOUS:

Ellett, *Airport Access Issues*, the Air and Space Lawyer, Summer 1987, p.1. 2,3,7

Letter from Philip J. Bakes, Jr., C.A.B. General Counsel, to Richard R. Heath, Director of Airports, City and County of San Francisco, (February 13, 1979) 11,12

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BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief of the Air Transport Association of America is filed with the consent of the parties. Letters of consent from the parties have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Air Transport Association of America (hereinafter "ATA") is an unincorporated, non-profit trade and service organization headquartered in Washington, D.C., representing the interests of the scheduled

airline industry. ATA's twenty-one U.S. members[1] account for more than 97% of the revenue passenger miles and freight ton miles produced by U.S. scheduled passenger and cargo airlines. The combined domestic and international passenger count in 1986 for U.S. scheduled airlines was 418 million passengers.

The correct construction and application of the federal aviation laws is of critical importance to ATA and its members. Of particular concern is the statutory provision at issue in this case as it functions to protect the right of air carriers to have access to the nation's airports.

The issue of airport access is fast becoming the most important economic issue facing the airline industry. It has been characterized by the Chief Counsel of the FAA as "the most important issue facing aviation in this country and [it] will remain so for at least twenty years."[2] Because of the natural tension between the goals of the Airline Deregulation Act of 1978[3] (hereinafter the "Deregulation Act") and locally imposed restrictions, the scope given by the courts

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[1] ATA operator member airlines are: Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Hawaiian Airlines, Inc., Midway Airlines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Pacific Southwest Airlines, Southwest Airlines Co., Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, and USAir, Inc. Associate members are: Air Canada and Canadian Airlines International.

[2] Ellett, *Airport Access Issues*, The Air & Space Lawyer, Summer 1987, at 1, from a speech delivered to the ABA Forum Committee on Air & Space Law, Fourth Annual Forum, October 1986.

[3] Pub. L. No. 95-504, 92 Stat. 1705 (1978).

to the express preemption provision of the Deregulation Act has far reaching economic implications for the nation's air carriers.

In the past few years, local airport authorities have formulated and imposed numerous types of access-related regulations without the institutional concern for the nation's air transportation system that only the FAA can provide. These regulations have led to numerous disputes and threaten to undermine the goals and purposes of the Deregulation Act, disrupt the smooth and efficient operation of the National Air Space System, and interfere with the free flow of the commerce of the United States. Unless clear guidelines are established defining the extent of local authority, local regulations will proliferate even further.

As further noted by the FAA's Chief Counsel:

> We in the FAA are concerned about [the *Western Airlines*] decision. *We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the Federal Government.* We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or regulate a carrier's routes, rates, or services.

Ellett, *supra*, n.2, at 19 (emphasis added).

A Proper resolution of the issues presented by this case is necessary to ensure the integrity of the Der-

egulation Act and to prevent the National Air Space System from crumbling under the stress of restrictive economic regulations, imposed by diverse local airport authorities, under the guise of exercising proprietary powers.

STATEMENT OF THE CASE

The underlying facts and procedural history of this case are set forth in the petition filed herein and will not be repeated here.

REASONS FOR GRANTING THE PETITION

I.

An Authoritative Construction of Section 105 of the Federal Aviation Act Is Essential to the Effective Operation of Deregulation

This case is important because proper construction of Section 105 of the Federal Aviation Act (49 U.S.C. App. 1305) is necessary to carry out the policy of Congress in enacting the Deregulation Act. The relevant portion of that section reads as follows (emphasis added):

> Sec. 105.(a)(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating *to rates, routes, or services* of any air carrier having authority under title IV of this Act to provide air transportation.

* * *

> (b)(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its *proprietary powers and rights.*

When Congress incorporated this provision in the Deregulation Act, it was well aware of the threat to deregulation posed by state and local authorities. The legislative history of Section 4 of the Deregulation Act, which added Section 105 to the Federal Aviation Act, is replete with references to the confusion and conflicts caused by state forays into the field of economic regulation of air carriers.[4] To clarify the Federal Government's assertion of jurisdiction over all economic aspects of the domestic operations of federally certificated airlines, and thereby remedy the "lack of specific provisions," Section 105 was included in the Act as an express federal preemption provision designed to shield the airline industry from locally

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[4] Examples are:

"The lack of specific provisions [on the jurisdiction of the States and the Federal Government over airlines] has created uncertainties and conflicts . . ." H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16-17 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751; "Section 423 is a new section to the Federal Aviation Act which the Committee has adopted to rationalize a confusing system of dual regulation of federally certificated air carriers that has evolved in some states." S. Rep. No. 631, 95th Cong., 2d Sess., p. 98 (1978), accompanying S. 2493.

imposed economic regulations. The goal, therefore, was not merely to end the confusion of dual regulation; more importantly, for the long term, Congress intended to assure that state and local authorities would not move to fill the vacuum left by the cessation of federal economic regulation of the national air transportation system.[5]

Congress did not enumerate the "proprietary powers and rights" addressed in paragraph (b) of Section 105, leaving it to the Civil Aeronautics Board (the "Board"), its successor the Department of Transportation, and the courts, to determine legitimate "proprietary powers and rights" which would not impinge upon the broad preemption of actions relating to rates, routes and services.

Although the Board quickly addressed the functioning of Section 105 in a formal Policy Statement adopted on February 7, 1979,[6] it declined the opportunity to fully flesh out the meaning of the operative phrase, "proprietary powers and rights." The Board noted that "[t]he full scope of those rights and powers has yet to be developed," and warned that "proprietary rights must be exercised to accomplish legitimate interests *in a manner that does not conflict with the*

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[5] "[I]t is possible that some states will enact their own regulatory ligislation, imposing, utility type regulation on interstate airline service and fares. The [Act] includes a specific statutory provision precluding state interference with interstate service and fares." 124 Cong. Rec. H10007-8 (daily ed. Sept. 23, 1977) (Sectional analysis of H.R. 8813, the Air Service Improvement Act of 1977, an early version of Deregulation Act).

[6] *Implementation of Preemption Provisions of the Airline Deregulation Act of 1978*, PS-83, 44 Fed.Reg. 9948 (Feb., 1979), amending 14 C.F.R. Part 399 (1979).

provisions and policies of the [*Airline Deregulation Act*]."[7]

To date, as the district court below recognized, the extent of airport proprietor rights and powers has not been defined precisely. *Western Air Lines Inc. v. Port Authority of New York and New Jersey,* 658 F.Supp. 952, 956 (S.D.N.Y. 1986). In the address, already referred to, given last year by the Chief Counsel of the FAA, it was noted that:

> The U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, pointed out in the now famous footnote 14 that a state or local government, as proprietor of an airport, does have some authority to set noise limits at its own airport. The real holding of the case, however, was that Congress, through the Federal Aviation Act and the Noise Control Act of 1972, had preempted non-airport proprietor control over aircraft noise. *Nothing in this case even hints at an extension of airport proprietors' rights into an area outside that of controlling aircraft noise.*
>
> The extent of these airport proprietors' rights has to this day not been clearly defined.

Ellett, supra n.2, at 19 (footnote omitted; emphasis added).

Thus, nearly ten years after the Deregulation Act was passed, it is evident that what Congress meant by Section 105(b)(1), in terms of an airport owner appropriately exercising proprietary powers in its own

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[7] PS-83, *supra*, n.6, at 9 (emphasis added).

behalf or on behalf of its residential neighbors, has not been adequately clarified.

Because of the pivotal importance of Section 105 to the continued benefits of economic deregulation and, therefore, the integrity of the Act so carefully crafted by Congress, this Court should grant the present petition and abort an emerging, *judicially created* conflict between the provision's two subsections.

II. The Statutory Construction Given Section 105 by the Court Below Frustrates The Underlying Congressional Intent.

A. Section 105 Explicitly Distinguishes Between *Governmental* And *Proprietary* Actions By State or Local Authorities.

The key to the proper construction of Section 105 lies in harmonizing the provision allowing state and local authorities to exercise "*proprietary* powers and rights" with the explicit preemption of *governmental* power relating to "rates, routes or services." When the Deregulation Act was passed, several states had created agencies to regulate airline operations within their states. Such state agencies regulated economic aspects of the operations as well as safety matters. *See* Texas Ann. Civ. St. art. 46c-6, subd. 3, as amended (Vernon, Supp. 1987), establishing the Texas Aeronautics Commission.

Also recognized by Congress was the fact that virtually every public airport is owned and operated by a local governmental authority. In contrast to the powers exercised by state regulatory agencies prior to 1978, airport authorities, generally, are granted only those limited powers, incidental to ownership, which are necessary to ensure the proper functioning of a public airport. Typically, such powers include the

control and maintenance of the terminal facilities and roadways, the ability to purchase property and the ability to enter into contracts.

Thus, it is absolutely consistent to say that an airport owner *may not* adopt a rule relating to routes or services, but that it *may* exercise proprietary rights and powers (that is, powers normally associated with the ownership and operation of a public facility). Subsection 105(b)(1) simply ensured that in prohibiting state agencies from imposing economic regulations on air carriers, the rights of airports to exercise powers traditionally exercised were not also swept aside. It was designed to do no more. To read Section 105(b)(1) as allowing airport owners to adopt rules relating to routes and services in the name of proprietary rights and powers is to render subsection 105(a)(1), and thus all of Section 105, meaningless.

The distinction between the exercise of *governmental* rights by state or local agencies, whose limited economic authority over airlines Congress sought to eliminate (except for wholly intrastate service), and the exercise of *proprietary* rights by state or local authorities created to own and operate airport facilities, but not having economic regulatory authority over airlines,[8] is crucial to the effective operation of the Deregulation Act and can only be clarified by a decision of this Court.

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[8] The Port Authority, for example, is not authorized to regulate airline rates, routes and services. *See* N.Y. Unconsol. Laws § 6407, §§ 6631, *et seq.* (McKinney 1979 and Supp. 1987).

B. Contemporaneous Constructions Of Section 105 By The Civil Aeronautics Board Support the Distinction Between Governmental and Proprietary Powers Of State And Local Authorities.

That Congress intended the powers of local authorities to be narrowly limited finds support in contemporaneous Board constructions of Section 105. As already noted, Policy Statement PS-83 states that in exercising proprietary rights, airport owners may not exercise those rights so as to "conflict with the provisions and policies of the ADA."

Even more specific is an opinion of the Board issued only a month after the Policy Statement. In *Austin/San Antonio-Atlanta Service Investigation*, 80 C.A.B. 242 (1979), the City of Austin argued, as the Port Authority does here, that there was a "critical shortage of airport terminal space" at Austin and that multiple awards would have the effect of "congesting airport facilities." *Id.* at 249. The Board not only rejected this argument, but warned:

> it should be emphasized that, *in refusing to impose irrational restrictions on our liberal entry policies, we are by no means conceding that local authorities may lawfully circumvent our policies by imposing the same types of restrictions under the guise of exercising so-called proprietary rights.* Quite the contrary, we think it clear that, under the new section 105(a)(1) of the Act preempting State and local authority over federally regulated routes and rates, it is the Board's actions implementing the Deregulation Act which will ultimately determine whether and in what

> manner new route authority shall be awarded.

Austin/San Antonio-Atlanta Service Investigation, supra, at 250 (emphasis added).

Thus, the Board made clear that it considered itself the sole possessor of jurisdiction over routes, rates and services, and further, that it would not condone interference with that jurisdiction from local authorities purportedly exercising proprietary rights.

Further support is found in a letter from then CAB General Counsel Philip J. Bakes, Jr., to Richard R. Heath, Director of Airports for the Airport Commission of the City and County of San Francisco, dated February 13, 1979.[9] Mr. Bakes' letter discusses the legality of a resolution adopted by the San Francisco Airports Commission to restrict use of San Francisco International Airport by new airlines not then serving the Airport. The rationale given by the Commission to support the resolution was a concern about increased noise due to deregulation. Among other things, the resolution required approval by the Commission of proposed routes and scheduling.

In explaining why Section 105 preempted the resolution, Mr. Bakes stated:

> Non-federal enactments relating to routes, rates and schedules are clearly forbidden by section105(a)(1) of the Federal Aviation Act. While I understand the desire of the Commission that there should be "a convenient level of air transportation service" available to Bay Area residents, any effort by the

[9] Appendix A, p. 1a.

> Commission to decide what that level of service is and to achieve it through the regulation of Bay Area airports is strictly prohibited by section 105(a)(1). The reason is because the Congress decided that those kinds of decisions should be made by travelers and shippers directly through the free play of market forces and that, to the extent governmental decision-making should replace competition and free consumer choice, the CAB should be the sole judge regarding airlines conducting interstate air service. The reason the Congress wants one decision-maker is obvious when you consider the chaos to interstate air service that would result if hundreds of airports around the Nation were conditioning landing and take-off rights on decisions about where the airlines should be flying to and coming from

Letter of Philip J. Bakes, Jr., Appendix A, p. 4a.

Thus, in yet another contemporaneous explanation of Section 105, the Board clearly states that a proprietor's rights and powers may not interfere with the marketplace decisions of carriers concerning their routes, rates and services.

III. The Decision Below Creates The Potential For Significant Disruption Of The National Air Space System And Interference With Interstate Commerce

As air traffic continues to grow under deregulation, local airport authorities, in increasing numbers, are seeking ways to control or limit aircraft operations. The Massachusetts Port Authority, for example, recently announced a plan at Logan Airport to dis-

courage peak-hour traffic by means of a varying fee schedule. The City of Long Beach (California), as this Court is aware,[10] has sought to restrict access by means of a slot rule similar to the FAA's high density rule.

Unless this Court provides an authoritative interpretation of Section 105, more and more local airport authorities are likely to impose increasingly strict regulations "relating to rates, routes or services," in the name of reducing ground-side congestion. This is not idle speculation. The ongoing spread of noise-based rules among the nation's airports[11] is dramatic evidence of the facile ability of airport proprietors to restrict airport access by means such as the perimeter rule in this case. If the decision below stands, it would have a serious practical effect on the National Air Space System.

A few examples demonstrate the substantial number of airline passengers who would be affected if a 1,500 mile perimeter rule were to be adopted at other major airports. Although these examples are hypothetical, they clearly show the potential of the regulation involved here as an interference with the preempted control over "rates, routes or services."

If the nation's busiest airport, Chicago O'Hare, were to adopt a 1,500 mile perimeter rule, a total of 44 flights per day would be eliminated, affecting 5,406

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[10] *City of Long Beach v. AirCal, Inc.*, No. 86-2002, *certiorari denied*, October 5, 1987.

[11] In a 1986 study, the FAA identified 37 noise control strategies in use at approximately 400 airports. Such strategies include number of operations restrictions, aircraft type restrictions, noise level restrictions, curfews, weight or thrust limitations, and noise use fees. *Airport Noise Control Strategies*, FAA Report No. FAA-EE-86-02 (May 1986).

passengers.[12] A similar perimeter rule at Los Angeles International Airport would eliminate 74 flights a day, affecting almost 11,000 passengers daily. If, in addition to these two airports, Atlanta, San Francisco and St. Louis imposed perimeter rules, a combined total of nearly 28,000 passengers per day, or more than 10.1 million passengers per year, would be impacted.[13] Finally, if the other two Port Authority airports were to adopt perimeter rules, an additional 59 flights per day would be eliminated, affecting more than 9,000 people daily.[14]

IV. CONCLUSION

This Court has never interpreted Section 105 of the Federal Aviation Act. Absent such a dispositive interpretation, inconsistent results will flow from increased litigation over the issue of airport access. In view of the importance of a smoothly functioning national air transportation system and the widespread public interest in safe, efficient, and economical airline service, ATA believes that this case presents an ideal opportunity for this Court to provide the clarification needed to resolve this important question of Federal law.

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[12] Based on schedules published in the Official Airline Guide on September 1, 1987, and assuming an average load factor of 60%, which is less than the industry average of 60.6% for 1986, and 62.5% for the first six months of 1987.

[13] Table 1, Appendix B, p. 8a.

[14] Table 2, Appendix B, P. 10a.

Respectfully submitted,

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APPENDIX A

CIVIL AERONAUTICS BOARD
Washington, D.C. 20428

February 13, 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, California 94128

Dear Mr. Heath:

I have received your letter of January 18, 1979, and have analyzed San Francisco Airports Commission Resolution No.79-0003 (January 16, 1979). The Civil Aeronautics Board shares your concern for the environment of the area surrounding San Francisco International Airport. The Board sees to it that the environmental implications of its actions are considered at every stage of the decision-making process. We are also eager to help airport proprietors, such as the Commission, to take reasonable steps to protect their airport's environment. It is in a spirit of cooperation that I and the Board's legal staff have reviewed Resolution No.79-0003.

The resolution severely restricts the use of San Francisco International Airport by new airlines not currently serving that airport. The resolution reflects the Commission's apparent belief that reduced federal economic regulation of air transportation may lead to an increase in commercial jet aircraft operations at the airport, and in turn to added noise levels in surrounding communities. The resolution restricts new airlines in several specific ways. It requires entering airlines to present to the Commission substantial information about proposed operations. Airline

arrangements involving San Francisco Airport concerning routes, scheduling, aircraft to be used, and groundside arrangements, require approval of the Commission. In addition, the resolution puts the Commission in the position of approving subleases and service arrangements involving entering carriers and provides that landing fee agreements will be made "only" with "those carriers [who] agree to exclusively utilize aircraft which are certified as meeting the noise requirements of Federal Aviation Regulation Part 36." Finally, through the resolution the Commission assumes responsibility to take "appropriate actions . . . to provide a convenient level of air transportation service to all Bay Area residents."

I have fundamental legal reservations about the method the Commission has chosen here to advance the obviously important environmental goals which you and the Board want to meet. The action of the Commission conflicts sharply with federal policy as set forth in the Airline Deregulation Act of 1978 (P.L.95-504), which was enacted to foster entry by air carriers into new interstate markets. In addition, the resolution's applicability to new but not incumbent airlines appears to violate the Constitutional prohibitions against discriminatory local regulations of interstate commerce, see *e.g., British Airways v. The Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977). It raises as well the possibility of conflict with grant assurances under the Airport and Airway Development Act (49 U.S.C. Sec. 1718) and thus may jeopardize your right to receive federal grant money administered by the Department of Transportation. The resolution may also violate section 308(a) of the Federal Aviation Act (49 U.S.C. 1349(a)), which provides in part:

> "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Finally, any attempt to dictate the type of aircraft to be operated—even if applied even-handedly—may conflict with a detailed federal noise policy developed by the Department of Transportation. In light of these legal shortcomings, the Commission may wish to consider rescinding or substantially amending Resolution 79-0003 to conform to federal law. As it stands now, it is vulnerable to legal challenge. And, since it conflicts with the policy of the Airline Deregulation Act which this agency is charged with administering, if the resolution remains in effect, I must consider recommending legal action by the federal government. On the other hand, should the Commission replace it with a non-discriminatory policy restricting use of the airport, we, and I am sure the Department of Transportation, would be more than happy to evaluate that policy independently.

There are three important factors in considering the legality of a restrictive airport use decision. First, is the restriction discriminatory? Second, if the restriction is not discriminatory, is it nevertheless unduly burdensome to interstate commerce? Finally, does the restriction relate to the routes, rates or services of any airline in interstate commerce under authority of the Civil Aeronautics Board?

The Commission's action is discriminatory and thus unlawful because it places substantial and perhaps insurmountable burdens on entering airlines which incumbent airlines do not bear, and puts new entrants at a significant disadvantage in seeking to compete in San Francisco markets. While incumbent carriers are free to add to their schedules at will, and thus may increase their flight frequencies as they choose, the resolution makes scheduling and other operating decisions of entering carriers the subject of a public proceeding, and allows those decisions to stand only if the Commission approves them. In addition, while incumbent carriers may serve the airport with aircraft meeting current federal noise requirements, the resolution places a much stricter standard on the operations

of new entrants and, in fact, *forbids* them to operate the same type of aircraft that incumbents *may* operate.

The particular method the Commission chose to protect against noise may conflict with an area that the federal government has preempted and may also unduly burden interstate commerce. The federal government has a comprehensive noise policy that phases out noisy aircraft over a four-year period and requires airlines to begin flying quieter aircraft in 1981 and to conform their entire fleets by 1985. If the San Francisco Airport, as it purports to do, or any other airport enforces more stringent equipment requirements, there would be a conflict with an area of regulation that the federal government may have preempted and there would probably be a serious disruption in interstate air service because planes lawfully departing from, say, Chicago, New York or Denver would not be able to land in San Francisco.

Non-federal enactments relating to routes, rates and schedules are clearly forbidden by section 105(a)(1) of the Federal Aviation Act. While I understand the desire of the Commission that there should be "a convenient level of air transportation service" available to Bay Area residents, any effort by the Commission to decide what that level of service is and to achieve it through the regulation of Bay Area airports is strictly prohibited by section 105(a)(1). The reason is because the Congress decided that those kinds of decisions should be made by travelers and shippers directly through the free play of market forces and that, to the extent governmental decision-making should replace competition and free consumer choice, the CAB should be the sole judge regarding airlines conducting interstate air service. The reason the Congress wants one decision-maker is obvious when you consider the chaos to interstate air service that would result if hundreds of airports around the Nation were conditioning landing and take-off rights on decisions about where airlines should be flying to and coming from.

Although my legal analysis of the situation does not support the Commission's action, perhaps you may wish to reconsider the policy, as well as legal, assumptions underlying the resolution in light of the considerable body of evidence that suggests that a competitive airline system is more likely than a strictly regulated system to minimize environmental damage. The Commission's premise seems to be that competition and new entry will cause an unacceptable increase in commercial jet operations at San Francisco International Airport. This is not necessarily the case. When airlines are forced to compete in markets, actual competition and the threat of competition by other airlines stimulate incumbent carriers to keep ticket prices down and to operate planes nearly full rather than half empty. Without adequate competition, the demonstrable tendency is the reverse: air carriers tend to charge higher ticket prices, but they compete away the extra revenues in scheduling competition—by offering more flights and thus more operations. This is a situation with which we are thoroughly familiar at the CAB. For almost forty years the CAB regulated the airlines in a way that discouraged price competition. This produced extensive frequency competition, with the result that many airports were subjected to many more landings and takeoffs than were necessary to carry the traffic.

It is the number of aircraft operations rather than the number of airline passengers or the identity of the airline that determines how much noise people living near an airport must suffer. While the lower ticket prices of recent months have stimulated travel, the incentives of deregulation—if price competition is allowed to develop without restriction—are toward putting more passengers in the airplanes before putting more planes in the air. When an airline has to compete in price and keep its costs low, it will tend to hold actual aircraft operations to a minimum. And our experience shows that easy entry by non-incumbent carriers is the single most powerful force to stimulate

price competition. If air carriers not currently serving an airport can arrange to use it without undue difficulty, the mere threat of new entry will encourage incumbent carriers to keep ticket prices as low as possible, and to fill their planes rather than operate half-empty flights, so as to avoid expenses which might make low fare operations unprofitable. So, discriminating against new airlines, and giving significant advantages to existing airlines not only conflicts with federal law but may well conflict with a sound environmental policy also.

The increased competition from new airlines and higher load factors also results in improved energy efficiency. A recent Air Transport Association study shows that scheduled airlines used 50 million gallons less fuel in 1978 than 1973 while carrying 78 million more passengers. Competition and the resulting higher load factors also explain why there were less than two percent more systemwide airline departures in fiscal year 1978 than in the preceding year while passenger enplanements rose nearly 12 percent. At some airports—and our fiscal year 1978 figures show San Francisco to be one of them—the actual number of departures decreased slightly while the number of passenger emplanements rose significantly. Figures for the first quarter of fiscal year 1979 show that although San Francisco International departures have increased modestly over the same quarter of the previous year, actual emplanements increased over 18 percent. Since we are still in a period of adjustment and transition, I would caution anyone, including myself, against using recent statistics to make firm predictions about the future. But, the indications are that increased airline competition and a better environment are not at all incompatible.

I would therefore urge you not only to reconsider the resolution but to consider carefully as well what impact new authority will have on San Francisco International Airport's environment before you make any decisions regarding restrictions which might be proposed to protect

the community's environment. If you determine that restrictions are required in spite of the favorable environmental consequences which may result from increased competition, I urge you to make them consistent with the important legal requirements I have outlined.

Let me repeat again this agency's sincere willingness to be of help. I have been in contact with Clark Onstad, Chief Counsel of the Federal Aviation Administration, and am confident of his and the Department of Transportation's willingness to also assist you in the discharge of y our legitimate and difficult proprietary duties. Both the CAB and the DOT will do all we possibly can to help you implement a plan which meets important legal and environmental requirements.

Sincerely yours,

Philip J. Bakes, Jr.
General Counsel

cc: Clark Onstad
Chief Counsel, FAA

APPENDIX B

Table 1

Origin	Destination	Flights/Day	Passengers Affected Daily
ORD	SFO	19	2,237
	LAX	25	3,169
	Total	44	5,406
LAX	EWR	7	1,175
	JFK	23	4,080
	ORD	26	3,169
	ATL	10	1,484
	STL	8	1,006
	Total	74	10,914
ATL	LAX	9	1,319
	SFO	7	966
	Total	16	2,285
SFO	EWR	4	624
	JFK	14	2,383
	ORD	20	2,445
	ATL	6	907
	IAH	6	484
	STL	4	520
	Total	54	7,363
STL	SFO	5	742
	LAX	8	1,044
	Total	13	1,786

Table 1 (Continued)

	Flights/Day	Passengers Affected Daily
Combined Total	201	27,754/day 10,130,210/yr.

ORD—Chicago O'Hare
LAX—Los Angeles Int'l.
ATL—Hartsfield Atlanta Int'l.
SFO—San Francisco Int'l.
STL—St. Louis, Int'l.
EWR—Newark Int'l.
JFK—Kennedy Int'l.
IAH—Houston Int'l.

Table 2

Origin	Destination	Flights/Day	Passengers Affected Daily
EWR	SFO	4	160
	LAX	7	1,131
	DEN	11	1,356
	Total	22	2,647
JFK	SFO	13	2,262
	LAX	22	4,026
	DEN	2	243
	Total	37	6,541
Combined Total JFK/EWR		59	9,188/day 3,353,620/yr.

DEN—Denver Stapleton Int'l.